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IN THE

Supreme Court of the United States

October Term, 1948.

No. 525

HYMAN MOORE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Lodge Appeal Press, Inc., 65-67 Duane St., N. Y. C., Tel. WOrth-2-0689

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays that a writ of certiorari be issued to the Court of Appeals for the Fourth Circuit to review the judgment of that Court.

Statement of Matter Involved.

This is a petition for a writ of certiorari to review a decision of the Court of Appeals for the Fourth Circuit, which affirmed a decision of the Tax Court of the United States deciding that there are deficiencies in the petitioner's income taxes for the calendar years 1943 and 1944 in the amounts of $23,869.93 and $2,613.62, respectively.

The petitioner relies, as he did in the court below, solely on the facts found by the Tax Court (R. 1-8). The case involves a partnership among two husbands (Isaac Scherr and Hyman Moore) and their respective wives (Jean Scherr and Rose Moore) for the operation of a wholesale wine and beer business. The Commissioner determined that neither wife was a *bona fide* partner, and taxed the entire income of the business to the husbands. The Tax Court decided, after trial by the Court, that Jean Scherr was a *bona fide* partner, because she had contributed original capital and was rendering vital services during the taxable years. It held, however, that Rose Moore was not a *bona fide* partner, because she had made no contribution of capital and was not rendering services during the taxable year. The present petition is for review of this latter holding, which has been sustained by the Court of Appeals.

Among the facts found by the Tax Court, but expressly treated as irrelevant in the opinion, are the following: (1) a substantial portion of the petitioner's original capital was given to him by his father-in-law at Rose Moore's request; (2) prior to obtaining a partnership interest Rose Moore for four years assisted in running the office and warehouse, and stopped working only when forced to do so by the birth of a child; (3) the plan for making the wives partners was initiated by Jean Scherr; (4) Rose Moore became a partner because the petitioner insisted that his wife deserved the same consideration as did Isaac Scherr's, and because he wished to protect her in the event of his expected induction into the armed forces; (5) the decision to form the partnership was made before the parties were aware of tax advantages; and (6) the partnership interests of Jean Scherr and Rose Moore were created at the same time and by the same instrument.

The Tax Court's opinion states, "We are of the opinion that Rose Moore contributed to the business neither capi-

tal originating with her nor vital services, and *therefore* was not, in reality nor for tax purposes, a partner in the enterprise." (Italics supplied.)

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code. Judgment was entered in this case by the Court of Appeals on December 2, 1948 (R. ....). No petition for rehearing was filed.

Opinions Below.

The memorandum opinion of the Tax Court, printed in full in the record (R. 1-9), is not reported. The opinion of the Court of Appeals is reported in 170 F. 2d 191, and is printed in full in the record (R. ....).

Specification of Error to Be Urged.

The Court of Appeals erred in affirming a judgment of the Tax Court which was based upon the erroneous rule of law that the validity of a partnership is determined solely by the nature of the capital or services contributed by a partner.

Reasons for Granting the Writ.

1. The rule of law announced by the Tax Court, and sustained by the Court of Appeals, is in conflict with the principles announced by this Court in *Commissioner* v. *Tower*, 327 U. S. 280, and *Lusthaus* v. *Commissioner*, 327 U. S. 293.

2. The decision of the Tax Court, affirmed by the Court of Appeals, is in direct conflict with decisions of other Courts of Appeals, including a decision of the Court of Appeals for the Fifth Circuit in which this Court has

granted certiorari. *Culbertson* v. *Commissioner*, 168 F. 2d 979.

3. The question decided by the courts below has been frequently litigated and is an important question of federal law which has not been, but should be, settled by this Court.

4. The rule of law adopted by the courts below, to the effect that an ultimate fact (*i. e.*, the validity or "reality" of a partnership) may be found on the basis of any single fact (*i. e.*, the nature of the capital or services contributed by a partner), to the exclusion of all other relevant facts, is so great a departure from the accepted course of judicial proceedings, that a review by this Court is required.

In the *Tower* case this Court said (327 U. S. 280, 290):

> "A wife may become a general or limited partner with her husband. But when she does not share in the management and control of the business, contributes no vital additional service, and where the husband purports in some way to have given her a partnership interest, *the Tax Court may properly take these circumstances into consideration in determining whether the partnership is real within the meaning of the federal revenue laws.*" (Italics supplied.)

It is obvious that this paragraph was not intended to state *any* single test for "reality"; capital and services are merely "circumstances" to be taken "into consideration" in the determination of that reality. The *Tower* opinion states (p. 286), "The formation of the partnership did not in any way alter the conduct of the business." Several elements contributed to this conclusion, including of course the facts that the business capital and business

management remained the same. The underlying fact, however, was that the transaction amounted to nothing but "drawing up papers". It was not intended to accomplish, nor did it in fact accomplish, an economic change in the business enterprise. The husband's control of the business, the wife's use of the income for things previously furnished by the husband, and, above all, the tax avoidance motive of the transaction—all pointed to this conclusion:

> "The arrangement we are here considering was of the type where proof of a motive to reduce income taxes simply lent further strength to the inference drawn by the Tax Court that the wife was not really a partner * * *. To rule otherwise would mean ordering the Tax Court to shut its eyes to the realities of tax avoidance schemes" (p. 289).

The Tax Court in the present case might have found that Rose Moore was not a "real" partner, even if it had considered all of the relevant facts. In that event, an affirmance on appeal might have been warranted, or even required. Cf. *Dobson* v. *Commissioner,* 320 U. S. 489. The Tax Court's error, however, was in deliberately closing its eyes to all facts other than the two which it has chosen to apply as the criteria in every "family partnership" case. That error is in conflict with the *Tower* principle, and requires reversal.

The Government's petition for certiorari in the *Culbertson* case states, "This case reflects an alarming tendency by some of the Courts of Appeal to circumvent the decisions of this Court in *Commissioner* v. *Tower,* 327 U. S. 280, and *Lusthaus* v. *Commissioner,* 327 U. S. 293 * * *. The case at hand represents the latest example in a series of recent cases in which the Tax Court has followed the *Tower* and *Lusthaus* principles, only to have its decision

reversed on the taxpayer's appeal." The Government cites the following cases as evidencing this "alarming tendency": *Lawton* v. *Commissioner*, 164 F. 2d 380 (C. C. A. 6th); *Weizer* v. *Commissioner*, 165 F. 2d 772 (C. C. A. 6th); *Woosley* v. *Commissioner*, 168 F. 2d 330 (C. C. A. 6th); *Canfield* v. *Commissioner*, 168 F. 2d 907 (C. C. A. 6th); *Simmons* v. *Commissioner*, 164 F. 2d 220 (C. C. A. 5th); *Singletary* v. *Commissioner*, 155 F. 2d 207 (C. C. A. 5th); *Wilson* v. *Commissioner*, 161 F. 2d 661 (C. C. A. 7th); *Durwood* v. *Commissioner*, 159 F. 2d 400 (C. C. A. 8th). In its brief, the Government adds the following subsequent decisions as evidence of the "increasing tendency in several circuits to re-examine the facts and to reverse decisions of the Tax Court * * * ": *Kent* v. *Commissioner*, 170 F. 2d 131 (C. A. 6); *Hartz* v. *Commissioner*, 170 F. 2d 313 (C. A. 8); *Walsh* v. *Commissioner*, 170 F. 2d 535 (C. A. 8); and *Graber* v. *Commissioner*, decided November 12, 1948 (C. A. 10).

We suggest that this "alarming tendency" is merely a recognition by the Courts of Appeals that the Tax Court has adopted an arbitrary rule of law in these cases which does not conform to the principles announced by this Court. Perhaps the appellate courts went too far in finding "reality" on their own examination of the facts; if so, the cases should have been remanded with directions to give proper weight to those facts. We respectfully suggest that procedure in the present case. The petitioner is content to have the Tax Court determine whether or not Rose Moore's partnership interest was "real", if only that tribunal will not feel bound to ignore most of the relevant facts which it accepted as proved at the trial.

It should be pointed out that the Tax Court's decision in this case does not represent an isolated instance of this error, or a mere inadvertence of language in the opinion. Nearly all of the cited cases, including *Culbertson*, evidence this "rule of law" which the Tax Court has imposed upon itself. We should like to call attention specifically

to another unreported decision now on appeal in the Court of Appeals for the Second Circuit. In *Margaret F. Horowitz et al.* v. *Commissioner* (Dkts. 9730, 9731, 9732, decided June 12, 1947), T. C. Memo, C. C. H. 15,843, P-H ¶47,153, the court found that the partnership interests in question grew out of an "emergent necessity"; nevertheless the opinion recites that the failure of the partners to contribute original capital or vital services compels the conclusion that the partnership interests were not "real".

It is this error of law which induced the House of Representatives to pass a retroactive corrective statute during 1948. H. R. 6712, Section 142, 80th Cong., 2d Sess. Unfortunately Congress adjourned before the Senate could act upon this legislation. We are advised, however, that such legislation will be reconsidered soon by the present Congress. The accompanying report of the Ways and Means Committee (80th Cong., 2d Sess., H. Rep. No. 2087, pp. 9-10) includes the following statement which is peculiarly applicable to the present case:

> "Legislation on family partnerships is deemed necessary because the lower courts and those administering the tax laws have taken the position that the Supreme Court's decision in the *Tower* and *Lusthaus* cases in 1946 limits the recognition of partner status in a family partnership to those who have contributed capital originating with themselves or who have performed vital additional services. At present no question is raised, however, if a husband makes a completed gift to his wife of stock in a family corporation. The gift is recognized, and the dividends paid on the stock are taxed as income to the wife. Nor would the courts or the administrative officials refuse to recognize for income tax purposes the income of a wife from rental property received as a *bona fide* gift from her husband.

> "The bill removes this discrimination with respect to the current and future years and also for open years back to 1941."

Because the decision in this case is in conflict with principles announced by this Court, by other Courts of Appeal, and by the House of Representatives, and because these principles are of great importance in the administration of the Federal tax laws, it is respectfully requested that certiorari be granted.

Respectfully submitted,

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January 27, 1949.